82-1688

No.:_____

IN THE

Supreme Court of the United States

October Term, 1982

WILLARD WILLIAMS,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the Second Circuit decision conflicts with this Court's holdings as well as those of other circuits when, without a hearing, it affirmed the denial of a motion to vacate a judgment of conviction on the claim that the plea of guilty was not knowingly and intelligently made?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Willard Williams, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 18, 1983.

Opinions Below

The opinion of the Second Circuit, rendered on February 18, 1983, is unreported. It is reprinted in the Appendix hereto, p. 1a, *infra*. An unreported memoran-

dum opinion of the United States District Court for the Southern District of New York, denying a petition pursuant to 28 U.S.C. §2255 to vacate the judgment, is reprinted in the Appendix hereto, p. 4a, *infra*.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The decision of the Court of Appeals was handed down on February 18, 1983.

Constitutional Provision Involved

United States Constitution, Fifth Amendment:

> No person shall...be deprived of life, liberty, or property, without due process of law.

Statement of the Case

Petitioner was indicted along with sixteen co-defendants, and charged with numerous violations of Title 21 U.S.C. with reference to the alleged possession and sale of narcotics. In addition he alone was charged with organizing a continuing criminal enterprise engaged in the possession and distribution of narcotics in violation of 21 U.S.C. 848.

Following counsel's plea negotiations with government counsel and discussions with the district judge and his law clerk, petitioner entered a plea of guilty on February 27, 1982 to 21 U.S.C. §848 in satisfaction of the charges pending against him.

On May 7, 1982 petitioner was sentenced to life imprisonment with no possibility of parole. *He is the only person ever to receive such a sentence upon a plea of guilty.*

Prior to plea, petitioner reserved for direct appeal three pretrial suppression motions. While the direct appeal was pending, the instant collateral attack upon the judgment was commenced by way of a petition pursuant to 28 U.S.C. §2255. The instant §2255 proceeding

was based upon the claim that petitioner's guilty plea was involuntary by reason of representations made to him by his own counsel and those of co-counsel who reported certain comments of the judge which reasonably led them as well as petitioner to believe a maximum sentence would not be imposed.

On October 27, 1982 the District Court denied relief without holding an evidentiary hearing.

On February 18, 1983 the Second Circuit affirmed the denial of the petition as well as affirming the judgment of conviction on the direct appeal. Petitions for certiorari from the two affirmances are filed at the same time.

In December 1981 counsel for petitioner as well as counsel for several of petitioner's co-defendants engaged in discussions with government counsel outside the courtroom of the trial judge to discuss the possibility of a disposition of the charges by way of plea. During these discussions, the Government first took the position that it would accept a plea from petitioner on two counts, each of which carried a maximum sentence of thirty (30) years. Following the expression of concern by counsel that the court might sentence petitioner to two consecutive thirty year terms, a conference with the district judge was had in an effort to learn the range of possible sentences should petitioner choose to plead guilty. The district judge was informed in open court that a plea offer had been made and a bench conference ensued. Counsel for petitioner outlined the plea offer made by the Government, including the sixty year exposure of his client. The Court then queried: "What's the problem?" Petitioner's attorney stated he was concerned that a maximum sentence would be imposed and requested guidance from the bench so that he could properly advise his client. The court responded: "Mr. Goldberg, sixty years is a long time." This statement was accompanied by facial expressions and was said in a tone which indicated to counsel present that petitioner's

counsel's fear of a maximum sentence was unwarranted. See: Affidavits of Paul Victor; Martin G. Weinberg; Philip Edelbaum; Jay Goldberg, all reprinted in the Appendix hereto, p. 9a, *infra.*

Several days later, the judge's law clerk telephoned counsel and directed his attention to the Judge's sentencing of Frank Moten reported in *United States v. Moten,* 564 F.2d 620 (2nd Cir. 1977) for guidance as to the judge's sentencing practice. The district judge, in that case had not imposed the maximum sentence.

The telephone call by the law clerk, coupled with the judge's remarks only a few days earlier, provided the information necessary for counsel to conclude that the district judge would not impose a maximum sentence were petitioner to plead guilty. In addition, counsel had conferred with government counsel and was assured that the government's pre-sentence memorandum would advise the court that petitioner was in a class of narcotic offenders comparable to Frank Moten. Accordingly, on numerous occasions (including the day petitioner entered his guilty plea) he was advised by his own counsel as well as counsel for the co-defendants that a maximum sentence would not be imposed were he to plead guilty and the foregoing reasons for counsels' belief that such a sentence would not be imposed.

Sometime in February 1982, the Government's offer was changed from two thirty year counts to one count of violating 21 U.S.C. §848, an offense which carries a maximum sentence of life imprisonment without parole. On February 27, 1982 petitioner entered a plea of guilty to that count.

Pursuant to the Rule 11, the court reviewed the possible sentences which could be imposed pursuant to 21 U.S.C. §848. With reference to a possible life sentence, the court stated:

> Do you understand that's the *outer limits* of the sentencing to which sentencing exposure -- to

> which you are subjecting yourself by entering this plea; do you understand that?* (Emphasis added)

Petitioner indicated that he understood and further responded that no one had told him what sentence he would receive.

On May 7, 1982 petitioner was sentenced to the maximum sentence possible, i.e. a life sentence without the possibility of parole.

On August 16 petitioner filed a petition to vacate his plea on the ground that it was wrongfully induced by representations of the court communicated to him by counsel with respect to the sentence the court would impose.**

On October 27, the district court dismissed the petition without holding an evidentiary hearing relying solely on the Rule 11 allocution to establish voluntariness. The court did not address itself to the issue of whether petitioner's plea was induced by erroneous representations made by counsel who reasonably relied upon the court's indication that it would not impose a maximum sentence. The government filed no opposition papers.

On February 18, 1983 the Second Circuit found that the conduct and comments of the trial judge were "ill advised" but affirmed the order denying the petition "in view of the later thorough allocution and other circumstances undermining the claim."

This petition for a writ of certiorari followed.

Reason For Granting The Writ

The Second Circuit decision directly conflicts with this Court's holdings in *Blackedge v. Allison,* 431 U.S. 63 and *Machibroda v. U.S.* 368 U.S. 487 as well as the holdings of at least three other circuits to the following effect: The courts below erred in denying without a

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* The Court did not advise about statutory ineligibility for parole.

** Petitioner's affidavit appears at p 6a of the Appendix.

hearing petitioner's claim that he was induced to plead guilty by erroneous representations made by counsel which were reasonably justified by the actions of the trial court as to the sentence he would receive were he to plead guilty.

In his application to the District Court, petitioner set forth sworn allegations by four attorneys present before the trial judge when the court's comment concerning the probable length of sentence was made. All asserted a consistent version of the judge's statement and the tone and facial expressions which accompanied it. In its memorandum dismissing the petition, the District Court not only admitted that the comment was made, but denied none of the assertions made by counsel concerning its presentation. The District Court had also contacted defense counsel for the express purpose of directing him to a sentence imposed by that court on one Frank Moten for guidance as to the court's sentencing practice. Once the court injected Moten's name and his sentence, counsel learned that the government intended to advise the court that petitioner was an offender comparable to Moten.

This information provided to defense counsel in the context of plea negotiations formed the basis for counsel's conclusion that the trial judge would not impose a maximum sentence were the case disposed of by a guilty plea.

Accordingly, on numerous occasions including the day petitioner entered the guilty plea, petitioner was advised by his own counsel as well as counsel for his co-defendants that a maximum sentence would not be imposed were he to enter a plea of guilty. On this basis, petitioner agreed to plead guilty.

The opinion of this Court in *Blackedge v. Allison*, 431 U.S. 63 (1976), illuminates several respects in which the decision below falls short in maintaining the constitutional protection against involuntary guilty pleas. With so much at stake for the petitioner in this case, it

is appropriate for this Court to once again remind the federal judiciary that a guilty plea induced by erroneous representations made by defense counsel who reasonably relied upon "ill advised" comments of the trial court, raises a serious constitutional question as to whether the guilty plea was knowingly and voluntarily made. *Blackedge, supra* at 75-6, fn.8.

This is not a case where defense counsel has erroneously *predicted* the sentence which would be imposed by the court should petitioner plead guilty. *Blackedge, supra* at 70; *United States v. Degand,* 614 F.2d 176, 178 (8th Cir. 1980); *Knight v. United States,* 611 F.2d 922 (1st Cir. 1979); *Seiller v. United States,* 544 F.2d 544, 568 (2d cir. 1975); *Masciola v. United States,* 469 F.2d 1057, 1059 (3d Cir. 1972); *Wellnitz v. Page,* 420 F.2d 935 (10th Cir. 1970). Counsel's advice to petitioner was based upon a non-exaggerated appreciation of the judge's comments, rather than, as in the cases cited above, defense counsel's own hopeful predictions of the sentence petitioner could expect. This is a case where numerous counsel actually assured petitioner that he would not receive the maximum sentence. These representations were not "couched in the language of hope," they were supported by reasonable, conservative interpretations of the judge's actions.

The First, Third and Eighth Circuits have held that if a defendant can show that his or her guilty plea were entered in reliance on false assurances by defense counsel regarding the length of the sentence that would be imposed, the guilty plea should be set aside as involuntary. *United States v. Unger,* 665 F.2d 251 (8th Cir. 1981); *United States v. Marzgliano,* 588 F.2d 395 (3rd Cir. 1978).

Thus in *McAleney v. United States,* 539 F.2d 282 (1st Cir. 1976), where defense counsel erroneously advised his client that the prosecutor had agreed to recommend a light sentence, the court held:

> (The defendant) was entitled to credit his attorney's representation as to the fact of such an

> agreement, and to rely on it; and if his guilty plea was in fact induced by such a representation, we agree with the district court that relief is in order.

In overcoming its own concession that the comments and conduct of the trial court were "ill-advised", the Second Circuit could point to only the Rule 11 allocution as evidencing petitioner's knowledge that he could receive a life sentence.* However, this Court has properly recognized that as a practical matter the Rule 11 allocution is an imperfect procedural mechanism which cannot be totally immune from collateral attack. *Blackedge v. Allison, supra,* 431 U.S. at 73; *Fontaine v. United States,* 411 U.S. 213, 215 (1973). Thus, even where a defendant's allegations are contrary to statements made on the Rule 11 record, the Third Circuit has afforded a defendant the opportunity to substantiate his allegation that his plea was induced by defense counsel's misrepresentations as to sentence exposure. *United States v. Marzgliano, supra,* 588 F.2d at 399.

Because "the motion and the files and records of (this) case [do not] conclusively show that petitioner is entitled to no relief," the dismissal of this petition without an evidentiary hearing was plain error (28 U.S.C. §2255).

This Court has stated that an evidentiary hearing should be held where, as here, "[t]he factual allegations contained in the petitioner's motion and affidavit... relate primarily to purported occurrences outside the courtroom and upon which the record could therefore cast no real light" and where "the circumstances alleged

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* In considering the petition, both the District and Circuit court treated the petition as though it were an application to reduce the sentence. As such, the memorandum opinions dismissing the petition set forth the trial court's basis for the lengthy sentence. This clearly was an erroneous analysis. The question presented in the petition was whether the plea was involuntarily entered, not whether the sentence was justified. In addition the Circuit decision perfunctorily mentions "other circumstances undermining the claim" with no discussion of what those circumstances were. Presumably, these "other circumstances" were the basis for the district court's sentence.

(are not) of a kind that the district judge could completely resolve by drawing upon his own personal knowledge or recollection." *Machibroda v. United States*, 368 U.S. 487, 494-495 (1962). This petitioner relied upon what was reported to him by several defense counsel:

> (1) the judge's comment, tone and facial expression that fear of a maximum sentence was unduly exaggerated, and
>
> (2) appreciation that when the judge, through his law clerk pointed to the Moten case this meant that the court would not impose a maximum sentence upon a defendant likened by the government as was petitioner to Moten.

In a case where a defendant has received the ultimate jail sentence provided by law it is elementary that the plea proceeding should be handled with pristine care. To characterize the trial court's comments as "ill advised" but to deny relief in a case where such severe penalties are imposed is to fail to do justice.

Conclusion

For these reasons, the petition should be granted.

Respectfully submitted,

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(212) 370-1000

Dated: April 14, 1983

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York on the eighteenth day of February, One Thousand Nine Hundred and Eighty-Three.

Present: HONORABLE J. EDWARD LUMBARD, HONORABLE WALTER R. MANSFIELD, HONORABLE AMALYA L. KEARSE, *Circuit Judges.*

WILLARD WILLIAMS,
Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,
Respondent-Appellee.

Dkt. No. 82-2336

Willard Williams appeals from an order of the Southern District of New York, Richard Owen, J., denying his petition pursuant to 28 U.S.C. §2255 to vacate his plea of guilty entered on February 17, 1982, to one count of an indictment (Count 2) charging him with

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organizing a continuing criminal enterprise engaged in the possession and distribution of large quantities of narcotics in violation of 21 U.S.C. §848. Williams, who was sentenced to life imprisonment on his guilty plea, preseved by stipulation three pretrial suppression claim issues which were separately appealed (Dkt. No. 82-1125) resulting in our affirmance of his conviction on this date in a separate opinion.

Williams contends that his guilty plea was not voluntary because he was induced by earlier comments of the sentencing judge to believe that he would receive a more lenient sentence than that imposed. We find no merit in this contention.

In January 1982 Williams' counsel sought to negotiate with the prosecutor a possible guilty plea to two other counts of the indictment, which would expose Williams to a maximum sentence of 60 years imprisonment, but first wanted to be advised by the court as to what sentence Williams might expect to receive if he pleaded guilty. This negotiation terminated when Judge Owen declined to predict what sentence might be imposed. The judge did state, however, that "sixty years is a long time" and when Williams' counsel thereafter sought a sentence conference Judge Owens' law clerk referred him to the case of *United States v. Moten*, 564 F.2d 620 (2d Cir.), *cert. denied*, 434 U.S. 942 (1977), in which Judge Owen had sentenced others found guilty of a narcotics conspiracy.

On February 17, 1982, the day after trial of the charges against him and others began, Williams offered to plead guilty to Count 2. Before accepting the plea Judge Owen conducted a thorough allocution, advising Williams, among other things, "You may be sentenced to not less than ten years and up to as much as life imprisonment." There was no suggestion by Williams or his attorney that he expected to receive less than a life sentence. Williams' counsel concedes that he told Williams that "he [counsel] could not estimate what

sentence he [Williams] would receive" although his counsel did not "believe" it would be the maximum. This was confirmed by Williams who stated he had not received any assurance or promises as to the amount of the sentence "because counsel has advised me that an estimate could not be given."

By the time Williams was sentenced on May 7, 1982, Judge Owen had gained much additional information about Williams' background and unlawful conduct (including prior narcotics convictions) from a long suppression hearing i. which Williams gave false testimony, a lengthy trial in which he was the central figure in a large unlawful narcotics enterprise, and receipt of a detailed pre-sentence report.

Although we believe that the district judge's gratuitous characterization of the possible 60 years maximum sentence that might be imposed if a prior plea negotiation had been consummated as a "long time" and his law clerk's reference of counsel to the *Moten* case were ill-advised, they fail to provide a basis for the §2255 claim of involuntariness in view of the later thorough allocution and other circumstances undermining the claim. See *Seiller v. United States*, 544 F.2d 554 (2d 554 (2d Cir. 1975); *United States ex rel. Scott v. Mancusi*, 429 F.2d 104 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

The order of the district court is affirmed.

J. Edward Lumbard, U.S.C.J.

Walter R. Mansfield, U.S.C.J.

Amalya L. Kearse, U.S.C.J.

Appendix B
Opinion of United States District Court

WILLARD WILLIAMS

v.

UNITED STATES

82 Civ. 5405

ENDORSED MEMORANDUM

OWEN, *District Judge*

On the basis of a statement I made from the bench that "60 years is a long time" and a communication from my office referring him to the *Moten* case, Mr. Williams contends that he was induced to plead guilty with the understanding that he would not be sentenced to life imprisonment. He presses this argument in spite of the fact that, upon his allocution for the taking of his plea, he replied "No" when he was asked, "[H]as anybody told you what you are going to get if you enter the plea?" His contention is plainly without merit.

Obviously the sentence imposed on any defendant depends on the specific facts of the defendant's involvement with the law. In this instance, Williams was sentenced after a lengthy suppression hearing at which he gave considerable testimony – much of which was false; after a lengthy trial of his co-conspirators where overwhelming evidence of his own guilt was adduced; and after careful consideration of a full presentence report detailing his long involvement with narcotics trafficking and his history of prior convictions.

I deemed Mr. Williams's life sentence appropriate when I imposed it and I continue to so regard it. The petition is dismissed.

So ordered.

s/s Richard Owen

United States District Judge

Dated: October 27, 1982
New York, New York

Appendix C
Affidavit of Willard Williams

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLARD WILLIAMS

v.

UNITED STATES

AFFIDAVIT OF WILLARD WILLIAMS IN SUPPORT OF FOREGOING MOTION TO VACATE PLEA

STATE OF KANSAS
COUNTY OF LEAVENWORTH

WILLARD WILLIAMS, being duly sworn, deposes and says:

Some time in December, 1981 Mr. Jay Goldberg told me that Richard Martin, the prosecutor, had offered a plea to two thirty-year counts to dispose of the case. He stated that counsel had a bench conference with the Judge where Mr. Goldberg informed the Court that he was concerned, lest consecutive maximum sentences be imposed. The Court, I was informed, stated: Mr. Goldberg, 60 years is a long time — in a tone and with facial expressions clearly indicating Mr. Goldberg's concern as to maximum sentence was inappropriate.

Not only Mr. Goldberg, but other counsel told me the clear message from Judge Owen was that I would not receive a maximum sentence if the case were disposed of by plea. I was told by Mr. Goldberg that the Law Clerk had suggested looking at the sentences imposed upon Frank Moten. I learned from inmates, as well as from Mr. Margolis, that Moten had not received the maximum sentence; rather, on two of the three counts concurrent sentences were imposed.

Mr. Goldberg advised that in conversations with the prosecutor he was informed that any presentence memorandum would liken me to Frank Moten, not Leroy Barnes.

On the day I took the plea all counsel met with their clients in the detention area of Courtroom 506. There, I was told once again, that it was not like Judge Owen to mislead counsel, that his tone and expression in December, 1981 had been accurately assessed by Mr. Goldberg and the obvious message was that he would not impose a maximum sentence on a plea. I believed I would receive a much more severe sentence if I did not plead.

I pleaded guilty relying on the advice of all counsel their assessment of Judge Owen's remarks, both as to 60 years being a long time and the relevance of the Moten sentences.

At the time when I took the plea, Judge Owen stated that he was going to ask me some questions to ensure that my plea was a voluntary one. After reviewing the possible sentences which could be imposed, the Judge referred to the life sentence and asked me if I understood that the sentence was the "outer limit" to which I was subjecting myself. He then asked me if any promises had been made with respect to what I was going to get. I answered no because counsel had advised me that an estimate could not be given. Counsel did tell me as they had done repeatedly since December of what occurred in December, that is, Mr. Goldberg's comments to the Judge, the Judge's response and the indication gleaned therefrom.

To that extent, it now appears that I was misled by these comments. If my counsel and the other lawyers accurately conveyed the comments and manner of Judge Owen, then the blame for my confusion rests squarely upon the Court. I did not take this plea truly believing that the Court would, in light of what occurred in December, impose a maximum sentence. I took this

plea only because I believed that Judge Owen would never mislead counsel and that he would abide by the indications he clearly put forth in December.

s/s Willard Williams
Willard Williams

Sworn to before me,
this 20th day of July,
1982.

s/s_____

Appendix D
Affirmation of Jay Goldberg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLARD WILLIAMS

v.

UNITED STATES

AFFIRMATION OF JAY GOLDBERG IN SUPPORT OF MOTION TO VACATE PLEA

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JAY GOLDBERG, an attorney, affirms under penalty of perjury:

In December, 1981, before counsel entered the Courtroom of Judge Owen, the prosecutor, Richard Martin, was approached by defense counsel about the possibility of disposing of the case by way of plea. Mr. Martin stated in the presence of several counsel, that he would offer Willard Williams a plea to two thirty-year counts and dismiss the remaining charges. I told him that I did not want to risk consecutive sentences and plea negotiations were thus, at that point, deadlocked. Paul Victor, attorney for Guippone, asked the prosecutor whether it would be possible to confer with the Judge in order to glean some idea of the Court's intentions as to Williams and the other defendants. The prosecutor stated that he would not object to such a discussion.

When the case was called, Mr. Victor informed the Court that counsel had plea discussions with the

prosecutor and were the case disposed of, a three-month trial could be avoided. The Court asked that we approach the Bench. Mr. Victor advised the Court that counsel were interested in disposing of the case by way of plea, but that we would like to get a sense of the Judge's intentions insofar as consecutive sentences were concerned. I advised the Court that the offer to Williams was two thirty-year counts. The Judge inquired: what's the problem? I responded that I was concerned, were the Court to impose consecutive thirty-year sentences. The Court responded: Mr. Goldberg, sixty years is a long time - in a tone and with facial expressions clearly indicating my concern was inappropriate. Several days later the Law Clerk called to report that Judge Owen would not have a sentence conference, but counsel was invited to look at Judge Owen's sentencing of Frank Moten, reported in *U.S. v. Moten*, 564, F.2d 620 (2d Cir., 1977).

This phone call, coupled with the Judge's remarks only a few days earlier, provided the information necessary for me to conclude that Judge Owen would not impose a maximum sentence.

In conversations with the prosecutor, I was advised that Williams was comparable in his drug dealing with Moten, not Leroy Barnes and further, he was considered as a subordinate of the co-defendants in the case, Porcelli and Guippone.

When the government altered the plea offer to a life count, the defendant pressed for some prediction of the sentence, were he to plead guilty. I told him that I could not estimate what sentence would be given, but I believed, as did all other counsel, that the Judge's remarks in December, coupled with his direction to have me look at the sentence imposed by him on Frant Moten, indicated that he would not impose a maximum sentence.

On the day of the taking of the plea, February 27, 1982, counsel met with the defendants in the detention

area and advised Williams once again of what had occurred in December and while no one could predict the sentence, it was not likely that Judge Owen would affirmatively have misled counsel in December. To all concerned, his action that day in December was meant to convey that he would not by plea impose a maximum sentence. And nothing was said by him thereafter to indicate otherwise. The defendant thereupon decided to plead guilty.

s/s Jay Goldberg

Jay Goldberg

Dated: New York, New York
August 16, 1982

Appendix E
Affidavit of Paul Victor

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLARD WILLIAMS

v.

UNITED STATES

AFFIDAVIT OF PAUL VICTOR IN SUPPORT OF MOTION TO VACATE PLEA

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

PAUL VICTOR, counsel to Robert Guippone, being duly sworn, deposes and says:

In December, 1981, defense counsel spoke with Assistant United States Attorney Richard Martin outside the Courtroom regarding the disposition of the case by way of plea. The prosecutor offered my client, as well as Anthony Porcelli and Willard Williams multiple counts. I asked Mr. Martin if he had any objection to defense counsel approaching the bench for the purpose of getting some idea as to the Court's intentions regarding Guippone and the other defendants, should multiple count pleas be entered. The prosecutor had no objection to such a discussion. Counsel thereupon entered the Courtroom. When the case was called, I informed the Court that defense counsel had been engaging in plea discussions with the AUSA, and were this case to be disposed of by plea a three-month trial could be avoided. The Court requested that counsel approach the bench. I then advised the Court of the offer made by the prosecu-

tion, but stated that we would first like to glean some idea of the Judge's intentions insofar as consecutive sentences were concerned.

Shortly thereafter, Mr. Goldberg, counsel for Willard Williams, stated to the court that the particular offer to his client was two thirty-year counts. The Court queried: What's the problem? Mr. Goldberg stated he could not plead a man to 60 years and was concerned, were the Court to impose consecutive 30-year sentences. The Court responded: Mr. Goldberg, 60 years is a long time. The manner in which this remark was delivered clearly indicated that Mr. Goldberg's concern was not warranted.

Several days later the Law Clerk telephoned Mr. Goldberg and suggested he look at the Trial Judge's sentencing of Frank Moten. I knew from *U.S. v. Moten*, 564 F.2d 620 that Judge Owen, in this case, had not imposed the maximum sentence.

I believed, as did all other counsel present at the time, that the Judge's remarks to Mr. Goldberg in December, 1981, coupled with his suggestion that Mr. Goldberg take note of the sentence imposed on Frank Moten, was a clear indication that he had no intention of imposing a maximum sentence on Willard Williams. Between December, 1981 to the taking of the plea, I stated to Williams on at least two occasions that Mr. Goldberg's assessment of Judge Owen's conduct comported with mine and the message was clear that a maximum sentence would not be imposed if the case were disposed of by plea.

s/s Paul Victor

Paul Victor

Sworn to before me,
this 6th day of August,
1982

s/s_____

Appendix F
Affidavit of Martin G. Weinberg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLARD WILLIAMS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AFFIDAVIT OF MARTIN G. WEINBERG IN SUPPORT OF MOTION TO VACATE PLEA

MARTIN G. WEINBERG, being duly sworn deposes and says:

1. I appeared of counsel to Frank Lopez, chief trial attorney for Anthony Porcelli, and Paul Victor, chief trial attorney for Robert Guippone, in the above-captioned matter;

2. That I have a specific recollection of being present in the United States District Court for the Southern District of New York for the purpose of arguing various pre-trial motions that remained unresolved prior to the scheduled commencement of trial in the above-captioned matter;

3. That the Honorable Richard Owen was on the bench conducting hearings or receiving arguments in a matter unrelated to the above-captioned matter and that various counsel, including Paul Victor, Jay Goldberg, Assistant United States Attorney Richard Martin, and I left the courtroom and walked into the main hall, which is perpendicular to the hall which leads to Judge Owen's court room;

4. That during the next ten to fifteen minutes there were various discussions between defense counsel and Assistant United States Attorney Martin; amongst the subjects being discussed were plea negotiations as to the trial which all counsel believed would take no less than two months of litigation;

5. That amongst the subjects in the context of the plea discussions were, as to Porcelli and Guippone, the peril of their receiving sentences that would exceed fifteen years and be based on the multiple offender notice that had been filed by the United States Attorney's Office and as to Willard Williams, the fear of his counsel that he would receive a sentence pursuant to 21 U.S.C. §848 that would be excessive or, if he was allowed to plead to two counts other than that brought under 21 U.S.C. §848 that he would be exposed to sixty (60) years imprisonment because of the filing of a multiple offender notice against him;

6. That Assistant United States Attorney Martin informed Mr. Victor and myself that under no circumstances would the policy of his office and/or his personal views permit him to support an excision or vacating of the multiple offender notice against Porcelli and Guippone;

7. That there was further discussion about the possibility of having a conference, either formal or informal, with Judge Owen with the intent of defense counsel being to discern whether the Court would consider sentencing defendants Porcelli and Guippone with sentences not in excess of fifteen years, i.e., a sentence without consideration of the multiple offender notice;

8. Later, counsel returned to the court room, and after or prior to arguments on Motions, approached the bench and discussed with Judge Owen the possibility of avoiding a lengthy trial by receiving some guidance from the court so that counsel could aid their clients

in making intelligent judgements as to whether or not to waive various constitutional rights relating to a trial by jury;

8. That I have a specific recollection on behalf of Porcelli and Guippone of informing the court that my wishes on their behalf was to receive some assurance that their sentence would not be in excess of fifteen years, i.e., that it would not include any multiple offender treatment, and that the court would consider a sentence less than fifteen years in that the possibility of their being paroled, i.e., not doing maximum time was small and in that they both were men whose age was in their fifties;

9. I recall Mr. Goldberg, on behalf of Willard Williams, having parallel concerns for his client, informing the court that he feared an exposure of sixty years for Mr. Williams and I recall the court's response being that sixty years is a long time, indicating both by words as well as by my observation of the court's demeanor that Mr. Goldberg's concerns as to his client receiving a sentence that would be based on multiple offender counts if he pled to two fifteen year counts was inappropriate;

10. The court, at the conclusion of the bench conference, informed counsel that he would consider the content of these discussions and would communicate any reaction to them to counsel;

11. I was informed by either Mr. Lopez or Mr. Goldberg that a law clerk for Judge Owen had informed some counsel that the Judge's response was that counsel should review the sentences that the court had imposed in the case of *United States v. Moten*, and that I, in reviewing the *Moten* decision determined, in my best judgment, the sentences that should be expected by defendants Porcelli and Guippone would not be the maximum thirty-year sentence, but could very well and probably would be in excess of fifteen years and that

Mr. Victor and Mr. Lopez had communications with the clients based on the law clerk's communication to counsel from Judge Owen;

12. It was my belief that as a result of the bench conference and the law clerk's communication to counsel that Mr. Goldberg's fear of a maximum sixty year sentence for Mr. Williams was inappropriate and that Mr. Williams would not receive a maximum sentence if he entered a plea of guilty.

SWORN to under the pains and penalties of perjury this 6th day of August, 1982.

s/s Martin G. Weinberg
MARTIN G. WEINBERG

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.
AUGUST 6, 1982

Then personally appeared the above-named Martin G. Weinberg, Esquire, and acknowledged that the foregoing Affidavit is his free act and deed, before me.

s/s _____

Appendix G
Affirmation of Ronald J. Margolis

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLARD WILLIAMS

v.

UNITED STATES

AFFIRMATION OF RONALD J. MARGOLIS IN SUPPORT OF MOTION TO VACATE PLEA

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

RONALD J. MARGOLIS, counsel to Sheila Williams, affirms under penalty of perjury:

I have read Mr. Jay Goldberg's affirmation and it correctly recites what Mr. Goldberg previously related to me at a meeting with Mr. Williams just prior to Mr. Williams agreeing to plead guilty. Mr. Goldberg had requested that I look at the Moten case. As I had represented a defendant in that case, I did recollect that Mr. Moten did not receive the maximum sentence and indicated that to Mr. Williams.

Based upon what Mr. Goldberg had related to me as to his discussion with the Court and his description of what occurred at his conference with the Court, I also recommended to Mr. Williams that he take the plea and under these circumstances it would seem clear to me that Judge Owens did not intend to impose a maximum sentence.

s/s Ronald J. Margolis
Ronald J. Margolis

Dated: New York, New York
August 3, 1982

Appendix H
Affidavit of Philip R. Edelbaum

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLARD WILLIAMS

v.

UNITED STATES

AFFIDAVIT OF PHILIP R. EDELBAUM IN SUPPORT OF MOTION TO VACATE PLEA

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

PHILIP R. EDELBAUM, counsel to George Williams, being duly sworn, deposes and says:

In December 1981, prior to our entry into Judge Owen's Courtroom, defense counsel approached the prosecutor, Richard Martin, regarding disposition of the case by way of pleas. Mr. Martin stated that he would offer Willard Williams a plea to multiple counts. Mr. Goldberg, counsel for Williams, was concerned at the time lest consecutive sentences be imposed. Mr. Victor suggested that we approach the bench for the purpose of ascertaining the Judge's intentions, should a plea to multiple counts be taken. We then entered the Courtroom.

When our case was called, Mr. Victor approached the bench and advised the Court of the offer made by the prosecution. He then stated that a three-month trial could be avoided if the plea were entered. Shortly thereafter, Mr. Goldberg stated to the Court that the offer to his client was two thirty-year counts. Judge Owen replied: What's the problem? Mr. Goldberg responded that he was concerned about his client receiving two

consecutive thirty-year sentences. Judge Owen responded: Mr. Goldberg, 60 years is a long time - delivered in a manner and tone which indicated to me, as well as other counsel present, that Mr. Goldberg's fears were unfounded.

Several days later Mr. Goldberg informed me that the Judge's Law Clerk had called him and told him to look at *U.S. v. Moten*, 564 F.2d 620 (2d Cir., 1977).

Both from the manner of Judge Owen's comments in December and his Clerk's reference to *Moten*, I believed that Judge Owen did not intend to impose a maximum sentence on Williams, should he take the plea.

s/s Philip R. Edelbaum
PHILIP R. EDELBAUM

Sworn to before me on this
6th day of August, 1982.

s/s_____

Appendix I
Affirmation of Salvatore F. Quagliata

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLARD WILLIAMS

vs.

UNITED STATES

AFFIRMATION OF SALVATORE F. QUAGLIATA
IN SUPPORT OF MOTION TO VACATE PLEA

STATE OF NEW YORK)
) SS.:
COUNTY OF QUEENS)

SALVATORE F. QUAGLIATA, counsel to Saint Julian Harrison, affirms under penalty of perjury:

I have read Mr. Jay Goldberg's affirmation. While I was not in court when Judge Owen made his remarks, they were related to me by Mr. Victor and also Mr. Goldberg. After being informed of the conversations, I believed that Judge Owen's remarks to counsel, coupled with the phone call to Mr. Goldberg a few days later suggesting that he take a look at the sentence imposed upon Frank Moten, was meant to convey that on a plea Williams would not receive a maximum sentence. Between December, 1981 to the taking of the plea, I told Williams on at least one occasion that my assessment of Judge Owen's conduct comported with that of Mr. Goldberg.

s/s Salvatore F. Quagliata
SALVATORE F. QUAGLIATA

Dated: New York, New York
August, 1982